

APR 19 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1446

MARK A. COLE,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
FIRST APPELLATE DISTRICT,
HAMILTON COUNTY, OHIO**

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. _____

MARK A. COLE,

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STATE OF OHIO,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Hamilton County Court of Appeals for the First Appellate District entered on October 25, 1976, which affirmed the Opinion and Order of the Hamilton County Court of Common Pleas entered August 10, 1976.

OPINIONS BELOW

The decision of the Court of Appeals is contained in its entry of dismissal dated October 25, 1976. It is unreported and reproduced in Appendix B. The Ohio Supreme Court refused sua sponte to exercise its jurisdiction reproduced in Appendix C.

JURISDICTION

The decision of the Court of Appeals was entered on October 25, 1976 from which a timely appeal was taken to the Ohio Supreme Court. The Ohio Supreme Court sua sponte dismissed the appeal, overruled the motion to certify the record from the Court of Appeals, thus, declining to exercise its jurisdiction over the case appendix D.

Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is an order of the trial court, denying the application of a defendant indicted for a felony, to take a deposition of material out-of-state witnesses, an appealable "final order" and denial of compulsory process?

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution — Sixth Amendment —

"... In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor ..."

Ohio Constitution — Section 10 — Article I —

"... In any trial, in any court, the party accused should be allowed to appear and defend in person and with counsel; ... to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf ...: but provision may be made by law for the taking of depositions by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court ..."
(emphasis added)

Ohio Revised Code § 2945.50

"At any time after an issue of fact is joined upon an indictment, ... the defendant may apply in writing to the court in which such indictment, ... is pending for a commission to take the deposition of any witness. The court or a judge thereof may grant such commission and make an order stating in what manner and for what length of time notice shall be given to the prosecution ... , before such witness shall be examined."

Ohio Revised Code § 2945.53

"In all cases in which depositions are taken by the ... accused, to be used by ... the accused, as provided in §§ 2945.50 to 2945.52, inclusive of the Revised Code, the court shall by proper order provide and secure to the accused the means and opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face, as fully and in the same manner as if in court. ..."

STATEMENT OF THE CASE

The Petition for Certiorari is prosecuted from the judgment of the trial court which was affirmed by the Court of Appeals, First Appellate District. The Ohio Supreme Court denied jurisdiction.

This is a criminal felony case in which Petitioner appealed from the order of the trial court denying Petitioner's Application To Take Deposition of Material Out-of-State Witnesses. Petitioner appealed to the First District Court of Appeals, Hamilton County, Ohio which appeal was dismissed. Petitioner then appealed to the Supreme Court of Ohio where Petitioner filed a Memorandum in Support of Claimed Jurisdiction. The Supreme Court of Ohio, no motion to dismiss the appeal having been filed, sua sponte dismissed the appeal for the reason that no substantial constitutional question existed. The Supreme Court also overruled Petitioner's Motion For Leave

to Appeal from the Court of Appeals for Hamilton County, Ohio.

The State of Ohio has set April 19, 1977 as Petitioner's trial date.

The Court of Appeals, First Appellate District, Hamilton County, Ohio, on November 21, 1966 in *State v. Stark*, 9 O.A. 2d 42, considered an appeal from an order denying an application to take depositions of a witness in a criminal case. The appellate court acknowledged that, ordinarily, it would not be authorized to consider an appeal from an interlocutory order, but since the defendant claimed a violation of the State Constitution (Section 10, Article I) in that the Defendant was being deprived of a right of compulsory process to procure the attendance of witnesses in her behalf, the court found that the deprivation of that right, prior to trial, would constitute a final order.

Section 10, Article I of the Ohio Constitution, for the adoption of laws, providing for the taking of depositions in criminal cases provides as follows:

"... In any trial, in any court, the party accused should be allowed to appear and defend in person and with counsel; ... to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf ...; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court ..."
(emphasis added)

Amendment VI, Constitution of the United States provides,

"... in all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor ..."

The right of the Sixth Amendment initially directed to federal criminal proceedings, is also a protection against state action and applicable through the Fourteenth Amendment. It is a right among those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions. It is basic to our system of jurisprudence, and is a fundamental right essential to fair trial, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.C. 1444, *Brookhart v. Janies*, 384 U.S. 1, 86 S.C. 1245.

The right to compulsory process is so fundamental that to require a defendant to go to trial without material witnesses' testimony, when the testimony would be available through the simple process of deposition, is essentially denying the right to a fair trial. It would be ludicrous to require a trial to go forward knowing that witnesses material to the defendant were not present, and knowing that the application having been denied, a merit appeal would be taken. It is equally ludicrous to assume because the Judge scratches out the words "final order", that this in any way changes the nature of the effect of the order upon the litigant. Petitioner properly raised constitutional questions so as to give this court jurisdiction to review the judgment on writ of certiorari.

REASONS FOR GRANTING THE WRIT

The judicial application of the statutes of Ohio and their judicial interpretation as they relate to a defendant in a criminal case accused of a felony constitutes a denial of due process of law, equal protection of law and the more fundamental right to compulsory process. The courts in their decisions and in their actions below have acted unconstitutionally as the court said in *State v. Stark*, 9 O.A. 2d 42, 222 N.E. 2d 794, 796:

"... It has been repeatedly indicated that the court's authority to grant applications for depositions is subject to strict compliance with the limitations on the process

laid down by the legislature in the exercise of its constitutional authority. See *Neiswender v. State*, 26 O.Cir. Ct.R.N.S., 247, 35 Ohio Cir.Dec. 116 (Application deficient in its representations); *Yunker v. State*, 8 O.A. 157 (No pertinency to justice of the peace cases — testimony sought not material); and *State v. Anthoulis*, 62 O.A. 113, 23 N.E.2d 312 (Evidence of character, credibility and reputation not contemplated). The taking of testimony by interrogatory is nowhere contemplated in criminal proceedings."

Petitioner's case does not fail for any exception, as the trial judge found the witnesses whose depositions were sought to be taken to be "material witnesses." appendix A. Thus, the denial of Petitioner's Application to take depositions of out-of-state "material witnesses" is a denial of fundamental rights contained in the Ohio and Federal Constitutions.

CONCLUSION

The Petition raises substantial constitutional questions of great public interest and is within the reach of this court's certiorari jurisdiction. We respectfully urge that the writ for which the petitioner prays be issued.

Respectfully submitted,

JAMES R. RIMEDIO
RODGER N. WALK
Attorneys for Petitioner

APPENDIX A

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

CASE No. B-754151

STATE OF OHIO,

Plaintiff,

vs.

MARK COLE,

Defendant.

ENTRY

(Entered August 10, 1975)

The Applications of Defendant to take the Depositions of material out-of-state witnesses, Ronald Shrader and James Michael Webb in the above captioned matter being finally argued before the Court on June 28, 1976 are hereby denied.

/s/ MORRISSEY
Judge

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APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-76637

STATE OF OHIO,

Appellee,

vs.

MARK A. COLE,

Appellant.

ENTRY OF DISMISSAL.
(Entered October 25, 1976)

This cause came on to be heard by the Court upon the motion of the appellee, State of Ohio, for an order of this Court dismissing the appeal and upon the memorandum in opposition thereto, and

The Court, being fully advised in the premises, finds that said motion is well taken and that the same ought to be and is hereby granted.

Wherefore it is Ordered and Decreed that the appeal is dismissed.

It is further Ordered that a certified copy of this judgment shall constitute the mandate to the Common Pleas Court of Hamilton County, Ohio, pursuant to Rule 27, Ohio Rules of Appellate Procedure.

3a

APPENDIX C

THE SUPREME COURT OF OHIO
1977 TERM

To wit: February 3, 1977

No. 76-1247

THE STATE OF OHIO,)
City of Columbus.)

STATE OF OHIO,

Appellee,

vs.

MARK A. COLE,

Appellant.

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19...

..... Clerk

..... Deputy

APPENDIX D

**THE SUPREME COURT OF THE STATE OF OHIO
1977 TERM**

To wit: February 3, 1977

No. 76-1247

THE STATE OF OHIO,)
City of Columbus.)

STATE OF OHIO,

Appellee,

vs.

MARK A. COLE,

Appellant.

**MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Hamilton County**

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, \$20.00, paid by James R. Rimedio.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19...

..... Clerk

..... Deputy